UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ROBIN BRANDT, personally, and as Personal Representative for the Estate of Richard Brandt	)	
Plaintiff	)	
v.	)	Docket No. 99-197-B
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, et al.,	)	
Defendants	)	

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

SINGAL, District Judge

Before the Court is a motion for partial summary judgment by Defendant United States Department of Veterans Affairs ("Togus") (Docket #49). Plaintiff, Robin Brandt, as well as Defendants, Dr. Rocco Franco and Quest Staffing Solutions ("Quest"), have filed objections to Togus's Motion for Summary Judgment.[1] For the reasons discussed below, the Motion is GRANTED IN PART and DENIED IN PART.

I. STANDARD OF REVIEW

A federal court grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

[1] Defendant Togus has argued that Defendants Franco and Quest do not have standing to object to the pending Motion for Summary Judgment on Counts I and II and, therefore, the Court should strike their objections (See Docket #58). However, the Court finds that Dr. Franco and Quest do have standing to object to Togus's Motion to the extent they have taken part in the discovery related to the issues argued in the Motion. More importantly, on the issue of who was Dr. Franco's employer during the early part of August 1997, it is clear to the Court that Dr. Franco and Quest are adverse parties advocating opposite positions. See Lars T., Ltd. v. New Penn Motor Express, Inc., No. 99-347-P-H, 2000 WL 1183245 at *1-*2 (D. Me. Aug. 15, 2000) (recommended decision adopted by Judge Hornby on Sept. 26, 2000).

judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the facts "in the light most amicable to the party contesting summary judgment, indulging all reasonable inferences in that party's favor." Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993). At the same time, the nonmovant cannot rely on "'conclusory allegations, improbable inferences, and unsupported speculation.'" Dynamic Image Techs., Inc. v. United States, 221 F.3d 34, 39 (1st Cir. 2000) (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)). Pursuant to this standard, the Court lays out the relevant facts below.

II. BACKGROUND

On August 23, 1997, 49 year-old Richard Brandt ("Brandt"), then a patient at VA Togus, died as a result of cardiopulmonary failure arising from a barbiturate-induced coma. (See Pl. Opposing Statement of Material Fact ¶ 39 (hereinafter "Pl. SMF").) Brandt was transferred to VA Togus on the evening of August 18, 1997 after being treated at Miles Memorial Hospital and diagnosed as status epilepticus. (See Def. Togus Statement of Undisputed Facts, Including Material Facts, in Support of the Mot. for Summ. J. ¶ 128 (hereinafter "Togus SMF").) Upon his arrival at Togus, Brandt was initially treated by Dr. Ronald Legum, a cardiologist who was the on-call doctor on the night of August 18th. (See id. ¶¶ 8, 130, 131.) At approximately 8:00 a.m. on August 19th, Dr. Rocco Franco, a neurologist, took over as Brandt's attending physician. (See id. ¶ 136.)

Later that same morning, Dr. Franco prescribed a loading dose of Dilatin (1500 mg) for Brandt. (See Togus SMF ¶ 140.) He also conducted EEG studies throughout the day to determine whether Brandt was still having seizures. (See Togus SMF ¶ 139.) On

the evening of the 19th, Dr. Franco determined that Brandt's seizures were continuing and he placed Brandt on a ventilator. Late that night, Dr. Franco induced a barbiturate coma to stop Brandt's continued seizures. (See Togus SMF ¶ 150.) Dr. Franco prescribed Thiopental (also known as Pentothal) to induce the coma.[2] (See Pl. Ex. 8.) At the time, pharmacists questioned Dr. Franco's protocol because they were unfamiliar with the use of high doses of Thiopental for treating status epilepticus. (See id.) After doing some brief research and being shown a protocol for use of Thiopental by Dr. Franco, the Togus pharmacist dispensed the requested amount of Thiopental. (See Togus SMF ¶¶ 174-76.)

In addition to the pharmacists, the nurses on duty in the special care unit, where Brandt was staying, also questioned Dr. Franco's decision to induce a barbiturate coma with Thiopental. (See Togus SMF ¶¶ 180, 183, 184.) After Dr. Franco provided the nurses with more information regarding his course of treatment, the nurses accepted Dr. Franco's decision. Dr. Brown, the chief of staff, also learned of Dr. Franco's decision to treat Richard Brandt by inducing a barbiturate coma. In response, Dr. Brown requested that the staff take particular care to monitor Brandt and his ventilation support. (See Togus SMF ¶ 188.)

With Dr. Franco actively attending to his patient, Richard Brandt was maintained on life support and remained in a barbiturate coma through August 22nd. (See Togus SMF ¶ 153.) On August 22nd, Richard Brandt began to experience multi-system organ failure. (See Togus SMF ¶ 204.) Based on this medical development, Robin Brandt, Richard's wife, decided to invoke his living will and terminate life support on the morning of August 23rd. (See Togus SMF ¶ 205.) Robin Brandt explained her decision

[2] The Court notes that material issues of fact remain regarding references to and the use of two structurally related barbiturates: Thiopental and Pentobarbital. (See Togus SMF ¶¶ 191-202.)

to Dr. Chaffin, the doctor on duty at the time, who then carried out Mrs. Brandt's instructions. Dr. Chaffin pronounced Richard Brandt dead at 1:45 p.m.. Shortly thereafter, Dr. Franco arrived on the ward. Dr. Franco proceeded to tell Brandt's wife and mother that he needed to keep Brandt on a ventilator and perform brain death studies for the next 24 hours. (See Togus Ex. 22.) After briefly arguing with Brandt's family when they objected to his proposed brain studies, Dr. Franco announced that he needed to confer with his priest and he left to make phone calls. At that point, Dr. Brown, the chief of staff was contacted. Dr. Brown came to the unit, relieved Dr. Franco of his clinical duties at the hospital, and expressed his condolences to the Brandt family. (See Togus SMF ¶¶ 232, 234, 235, 238.)

Dr. Franco's Contract

Dr. Franco came to work at Togus in the summer of 1997 pursuant to a contract between Togus and Quest Staffing Solutions ("Quest"), a temporary medical staffing company. Earlier in the summer, Togus solicited bids for supplying a board certified, ACLS certified neurologist for approximately 90 calendar days. (See Togus Exs. 5, 6.) Togus was in need of a temporary neurologist while it searched for a new permanent neurologist. (See Togus SMF ¶ 15.) Quest responded to Togus's solicitation with a bid to provide such services at the rate of $82 an hour. (See id. ¶¶ 1, 19, 22.) Included in this rate was the cost of providing workers compensation, professional liability insurance, income tax withholding and social security payments. (See Togus Exs. 5, 6.)

Before the contract between Quest and Togus could be executed, Quest was required to present Togus with a specific applicant to fill the position. (See Togus SMF ¶ 21.) On July 10, 1997, Quest presented Dr. Franco and supplied Togus with a copy of

Dr. Franco's Curriculum Vitae ("CV"). (See Togus SMF ¶ 22.) Additionally, Dr. Franco completed and signed a VA application including additional information regarding his qualifications. (See Togus SMF ¶ 25.) Ultimately, the contract executed by Quest and Togus specifically stated, "the parties agree that such personnel shall not be considered VA employees for any purpose and shall be considered employees of the contractor." (Togus Ex. 6 at 3.)

The Credentialing and Privileging of Dr. Franco

Prior to Dr. Franco's arrival, Togus undertook a background check of Dr. Franco's qualifications. This process is commonly referred to as the "credentialing and privileging." At Togus, the Medical Staff Coordinator, Lynn Duplessis, is responsible for credentialing and privileging in accordance with the standards proscribed in the Veterans Health Administration Handbook ("VHA Handbook") and the Togus Bylaws of the Medical and Dental Staff ("Togus Bylaws"). (See Togus Exs. 24, 25.)

The VHA Handbook, as well as the Togus Bylaws, lay out specific procedures for verifying a physician's employment history as well as the physician's educational credentials, including the physician's license and board certification. Additionally, the VHA Handbook requires three references and certification of health status. (See Togus Ex. 24.) The Handbook also allows for "Temporary Privileges in Emergency Situations". (Togus Ex. 24 at 19.) Pursuant to this exception to the regular credentialing procedure, if the Facility Director documents "the specific circumstances and patient care situation" creating the emergency or urgent need, temporary privileges may be granted for up to 45 work days "based on documentation of a current State license and other reasonable, reliable information concerning training and competence". (Id. at 16, 19.) Thus, in

emergency situations, temporary privileges permits a less exacting review of a physician's credentials.

In credentialing Dr. Franco, Togus, through its employee, Lynn Duplessis, did not follow the Handbook's requirements for a complete credentialing. Rather, Togus conducted the abbreviated credentials verification as contemplated by the "Temporary Privileges in Emergency Situations" exception. (See Togus SMF ¶ 38.) As part of this abbreviated credentialing process, Duplessis queried the National Practitioner Data Bank. The query contained no adverse information regarding Dr. Franco and confirmed that he was a licensed physician in Indiana. (See Togus SMF ¶ 44; Togus Ex. 15.) Additionally, Duplessis put together a credentialing file on Dr. Franco that consisted of: (1) Dr. Franco's CV and completed VA application, (2) verification of Dr. Franco's DEA license and his license to practice medicine, and (3) three letters of reference. (See Togus SMF ¶¶ 42, 43; Togus Exs. 12-15.)

Duplessis then presented a copy of Dr. Franco's CV to Dr. Gerry Hayes, then acting as chief of staff, for his review. Based solely on his review of the CV, Dr. Hayes determined that Dr. Franco was qualified. After compiling the credentialing file, Duplessis gave the entire file, along with a one-page letter recommending privileges for Dr. Franco, to the current acting chief of staff, Dr. Danielle Mutty. Without reviewing the file, Dr. Mutty signed the letter recommending that Dr Franco be extended privileges for 63 days beginning on July 21, 1997 and expiring on September 21, 1997. (See Togus Ex. 2.) Neither Dr. Hayes nor Dr. Mutty conducted any investigation into Dr. Franco's credentials. Rather, both Dr. Hayes and Dr. Mutty relied on Duplessis's work in determining that Dr. Franco was qualified. (See Pl. SMF ¶¶ 17, 18.)

Dr. Franco's Employment at Togus Prior to August 19th

After receiving temporary privileges, Dr. Franco began practicing as a "locum tenens" or contract neurologist on July 23, 1997.[3] In that capacity, Dr. Franco was provided a list of patients to see and used Togus's equipment as well as Togus's support staff to treat these patients. (See Pl. SMF ¶¶ 24, 26.) This work was supposed to be completed during the work schedule set by Togus. (See Pl. SMF ¶ 28.)

On July 31, 1997, shortly after Dr. Franco began working at Togus, Togus contacted Quest asking that it replace Dr. Franco within a week because Dr. Franco did not meet the contract requirements. (See Togus Ex. 8.) Specifically, Dr. Franco was not currently ACLS certified and could not perform EMGs. (See id.) In response, Quest agreed to have Dr. Franco ACLS certified and also agreed to search for a replacement. (See Togus Ex. 9.) In the interim, Dr. Brown agreed to monitor Dr. Franco. (See Togus Ex. 10.)

Additionally, by this point, Togus had expressed concerns to Quest regarding Dr. Franco's repeated need to work overtime to complete his work. (See Togus Ex. 10.) These concerns continued and resulted in Togus again contacting Quest to complain about Dr. Franco on August 14, 1997. (See Togus Ex. 11.) In addition to contacting Quest regarding Dr. Franco's deficiencies, Dr. Brown spoke with Dr. Franco directly on several occasions prior to Richard Brandt's arrival at Togus.

III. DISCUSSION

Counts I and II of Plaintiff's Amended Complaint seek recovery from the United States Department of Veterans Affairs pursuant to the Federal Tort Claims Act

[3] Contract physicians, who are retained on a temporary basis, are also known as "locum tenens." (See Togus SMF ¶ 9.)

("FTCA"), 28 U.S.C. § 2671 et seq. Under the FTCA, the United States is liable for the negligence of its employees "to the same extent as a private individual under like circumstances." Id. § 2674.

In this case, Plaintiff alleges four theories of liability against Togus.[4] The Court will examine each of these theories in turn.

A. Vicarious Liability

1. Whether Dr. Franco Was an Employee or an Independent Contractor

Plaintiff first alleges that the United States is liable for the negligence of Dr. Franco because Dr. Franco was a government employee during the time he was treating Richard Brandt. Specifically, Plaintiff suggests that Dr. Franco became an employee when the chief of staff, Dr. Brown, agreed to keep Dr. Franco, subject to additional monitoring, while Quest was searching for a replacement. Additionally, Plaintiff points out that in almost all respects Dr. Franco was indistinguishable from the other doctors at Togus who were, in fact, government employees.

Other courts have previously struggled with determining when a physician is an employee as compared to an independent contractor for purposes of the FTCA. See, e.g., Linkous v. United States, 142 F.3d 271, 275-77 (5th Cir. 1998) (concluding that physician who provided gynecological services through a direct partnership agreement with an army community hospital was an independent contractor); Carrillo v. United States, 5 F.3d 1302, 1304-05 (9th Cir. 1993) (finding pediatrician was an independent contractor);

[4] To the extent Togus objects to Plaintiff's evolving theories of liability in this case, the Court finds that Mrs. Brandt's administrative claim (Togus Ex. 28) satisfied the presentment requirement of the FTCA. See 28 U.S.C. § 2675. To satisfy these requirements, Mrs. Brandt did not need to list her legal theories of medical malpractice. Rather, she simply needed to provide enough information to make investigation of her claim possible. See Santiago-Ramirez v. Secretary of Dep't of Defense, 984 F.2d 16, 19 (1st Cir. 1993) ("This circuit approaches the notice requirement leniently . . .."); Williams v. United States, 932 F. Supp. 357, 361 (D.D.C. 1996) ("[I]t is not compulsory under the presentment requirement to list the legal theory . . . upon which the plaintiff's claim is based.").

Lilly v. Fieldstone, 876 F.2d 857, 859-60 (10th Cir. 1989) (finding doctor acted as an independent contractor when he performed emergency surgery at an army hospital). It is noteworthy that none of these courts have concluded that an independent physician, as compared to a resident physician, was an employee when the United States argued that the physician was, in fact, an independent contractor. See Robb v. United States, 80 F.3d 884, 890 (4th Cir. 1996) ("The circuits have consistently held that physicians either in private practice or associated with an organization under contract to provide medical services to facilities operated by the federal government are independent contractors . . ..") (citations omitted); cf. Ezekiel v. Michel, 66 F.3d 894, 900 (7th Cir. 1995) (finding resident physician was a government employee when the United States advocated that position); Costa v. United States Dep't of Veterans Affairs, 845 F. Supp. 64, 66-69 (D.R.I. 1994) (same).

In determining whether Dr. Franco was an independent contractor or a government employee at the time he treated Richard Brandt, the Court must consider whether the government controlled the details of Dr. Franco's performance under the contract. See Logue v. United States, 412 U.S. 521, 528 (1973) (explaining that the critical factor for purposes of the independent contractor exception is the extent to which the federal government controls "the detailed physical performance of the contractor"). This factor has presented problems in the assessment of physicians, who necessarily retain independent judgment regarding treatment of individual patients. See Lilly, 876 F.2d at 859 (explaining that "a physician must have discretion to care for a patient and may not surrender control over certain medical details"). In this case, it is clear that Dr. Franco retained such independent judgment regarding the patients he treated at Togus,

including Richard Brandt. At the same time, the government controlled Dr. Franco's hours and decided what patients he would see. Thus, in this case, as in other cases, the critical factor of government control over the details is not determinative. See, e.g., Linkous, 142 F.3d at 275-76.

Consequently, the Court considers the facts as they relate to the factors laid out under Section 220 of the Restatement (Second) of Agency.[5] After considering all of these factors, the Court concludes that the facts relating to Dr. Franco's work environment at Togus, which Plaintiff relies upon, do not override the agreement between Togus and Quest, which clearly contemplated an independent contractor relationship.[6] In other words, while factors (e) and (g) support Plaintiff's claims that Dr. Franco was acting as an employee of Togus, factors (b), (c), (d), (f) and (i) support the conclusion

[5] Section 220 lists the following factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2) (1958).

[6] In fact, the contract between Togus and Quest included the following language:

> It is expressly agreed and understood that this is a nonpersonal services contract . . . under which the professional services rendered by the Contractor or its health-care providers are rendered in its capacity as an independent contractor. The Government may evaluate the quality of professional and administrative services provided by [sic] retains no control over professional aspects of the services rendered, including, by example, the Contractor's or its health-care providers' professional medical judgment, diagnosis, or specific medical treatments.

(Togus Ex. 6 at 12.)

that Dr. Franco remained an independent contractor throughout his time at Togus. Specifically, the agreement called for Quest to pay Dr. Franco, withhold necessary taxes and provide liability insurance for him. Additionally, the contract contemplated that Quest, through its agents, would provide specialized neurology services for a short period of time.

To the extent Plaintiff argues that Dr. Franco may have been brought under the umbrella of government employee when Dr. Brown agreed to additional monitoring of Dr. Franco, The Court finds that this additional monitoring did not alter the written agreement between Quest and Togus. See Restatement (Second) of Agency § 220(2)(a).

Additionally, the Court notes that the facts of this case suggest that Dr. Franco was no different than an independent private physician practicing within a private hospital. Under these circumstances, a private hospital in Maine would not be vicariously liable for the negligence of the physician. See Gafner v. Down East Cmty. Hosp., 735 A.2d 969, 976 n.8 (Me. 1999); see also Wright, Miller & Cooper, Federal Practice and Procedure § 3658, at 573 & n.27 (3rd ed. 1998) (discussing the FTCA requirement of parallel liability under state law).

2. Apparent Agency

Plaintiff also suggests that by failing to distinguish Dr. Franco from other employee physicians, Togus cloaked Dr. Franco in apparent authority. The Court must consider this argument in light of its above discussion concluding that Dr. Franco was, in fact, an independent contractor for the purposes of the FTCA. Clearly, a finding that Togus was liable for the actions of Dr. Franco because he was their apparent agent would circumvent this federal limit on vicarious liability under the FTCA. See Williams v.

Inverness Corp., 664 A.2d 1244 (Me. 1995) (discussing the law of apparent authority in Maine).

However, in this case, the Court need not resolve this potential conflict. Assuming that Togus can be said to have negligently held Dr. Franco as their agent, there is no evidence that the Brandts relied upon representations that Dr. Franco was an agent of Togus. In fact, given Richard Brandt's condition at the time Dr. Franco began treating him, it is unlikely he consciously drew any conclusions regarding Dr Franco. Thus, even if Togus had required its independent contractor physicians, such as Dr. Franco, to wear special jackets and special name tags that made clear they were not agents of Togus, it is unlikely that the Brandts would have relied on Dr. Franco any differently.

At most, the Brandts justifiably inferred that Dr. Franco was acting as Richard Brandt's attending neurologist because he had the credentials necessary to provide such treatment. To the extent the hospital failed in its duty to ensure that Dr. Franco did, in fact, have the credentials to be Brandt's attending neurologist, Plaintiff is pursuing this theory of liability separately. However, on the facts presented, and considering the current state of the law in Maine, the Court cannot accept Plaintiff's argument that by presenting a neurologist to care for Richard Brandt within Togus's walls, Togus represented to the Brandts that Dr. Franco was its servant. [7]

[7] To say that anyone who is admitted to a hospital may justifiably infer that every doctor he sees is an agent of the hospital would expand the duty of hospitals far beyond the duty currently endorsed by the Law Court. See Gafner, 735 A.2d at 978-80; see also Williams, 664 A.2d at 1246 ("Whether one party owes a duty of care to another is a question of law. . . . Duty involves the question of whether a defendant is under any obligation for the benefit of the particular plaintiff. . . . We have observed that many factors can influence the duty determination . . .") (citations omitted).

B. Negligent Supervision

Based on the Court's previous determination that Dr. Franco retained his status as an independent contractor throughout his stay at Togus, the Court is left to consider whether the United States may be held liable for its supervision of an independent physician. Maine has thus far refused to endorse this as a theory of liability against private hospitals. See Gafner, 735 A.2d at 978-80. Therefore, it does not appear that Plaintiff may recover based upon the theory of negligent supervision.

Moreover, the Court concludes that the United States retains its immunity under this theory of liability because it falls under the discretionary function exception to the FTCA. In applying the discretionary function exception, the Court must first "identify the conduct that allegedly caused the harm." Shansky v. United States, 164 F.3d 688, 690-91 (1st Cir. 1999). In this case, the conduct was the failure of Togus to provide greater supervision of Dr. Franco while he was treating Richard Brandt.

Then, the Court must separately consider two questions: "Is the conduct itself discretionary? If so, is the discretion susceptible to policy-related judgments?" Id. at 691. In this case, Plaintiff cannot point to any language in the contract or any VA policy that required Togus to supervise Dr. Franco. In the absence of any regulation or policy requiring Togus to engage in a specific type or level of supervision, the decision to supervise Dr. Franco was discretionary. See Kirchmann v. United States, 8 F.3d 1273, 1276 (8th Cir. 1993).

Turning to the question of whether Togus's decision regarding supervision is susceptible to policy-related judgments, the Court concludes that the extent to which government employees supervise a temporary independent physician involves the

balancing of incommensurable values including quality of patient care, efficiency, budgetary restraints and overall institutional concerns. See Shansky, 164 F.3d at 694. Thus, unlike credentialing and privileging, which the Court discusses below, supervision does not simply "embod[y] a professional assessment undertaken pursuant to a policy of settled priorities . . .". Id.

C. Negligent Credentialing

Plaintiff also argues that Defendant Togus was independently negligent in its credentialing of Dr. Franco. In Maine, the Law Court has recognized that Maine statute creates an affirmative duty on the part of a hospital to assure that "[p]rovider privileges extended . . . to any physician are in accordance with those recommended by the medical staff as being consistent with that physician's training, experience and professional competence . . .". 24 M.R.S.A. § 2503(2); see Gafner, 735 A.2d at 978-79.

Defendant asserts that its credentialing of Dr. Franco complied with VHA published policies for urgent temporary appointments. (See Def. Mem. of Law in Support of United States Mot. for Summ. J. at 27 (Docket #49).) As previously described in the facts, credentialing at Togus is governed by a published VHA Handbook as well as the Togus Bylaws. (See Togus Exs. 24, 25.). These written policies give some discretion to the chief of staff and facility director in the case of temporary privileges granted to fulfill an emergency situation or urgent need. Such temporary appointments may not exceed 45 work days. In the case of longer appointments, the VHA Handbook and Togus Bylaws require more specific and detailed credentialing prior to granting privileges. The policies requiring this more extensive credentialing are clearly laid out and not discretionary.

The Court concludes that there is a material issue of fact with regard to whether Dr. Franco's appointment fit within the 45 work day requirement laid out in VHA's handbook.[8] (See Togus Ex. 24 at 19.) Therefore, a reasonable factfinder might, in fact, conclude that Dr. Franco's appointment exceeded 45 days or otherwise did not fit within the VHA's provison for "Temporary Privileges in Emergency Situations." (See id.) Based on this finding, there is also evidence upon which a reasonable factfinder might conclude that Togus was negligent and failed to follow its own handbook and bylaws in privileging Dr. Franco for the period from July 21, 1997 to September 21, 1997.[9]

Defendant also argues that a reasonable factfinder could not conclude that Togus's failure to comply with credentialing requirements proximately caused the damage alleged by Plaintiff. To find proximate cause, a factfinder would have to find that Togus's negligent credentialing "played a substantial part in bringing about or actually causing the injury . . . and that the injury . . . was either a direct result or a reasonably foreseeable consequence of the negligence." Merriam v. Wanger, 757 A.2d 778, 780-81 (Me. 2000). While Plaintiff admittedly faces an uphill battle in proving that negligent credentialing proximately caused Mr. Brandt's death, the Court must construe the facts in the light most favorable to Plaintiff at this stage. Considering this standard, the Court finds that there is an issue of material fact with regard to proximate cause on

[8] In fact, Dr. Franco was granted privileges for a period of 63 calendar days. (See Togus Ex. 2.) There is no evidence suggesting that Dr. Franco was actually scheduled to work only 45 of those days nor is there anything in the appointment referring to Dr. Franco's appointment as either "emergency" or "urgent." (See Togus Ex. 2.) Additionally, the contract under which Dr. Franco came to Togus called for a contract neurologist to serve for a period of approximately 90 days. (See Togus Ex. 6 at p.3.) Considering these facts in the light most favorable to the Plaintiff, the Court cannot infer that Dr. Franco was only extended privileges for 45 work days.

[9] Until these material issues of fact are clarified, the Court declines to address whether abbreviated credentialing pursuant to the "Temporary Privileges in Emergency Situations" actually falls within the discretionary function exception.

this theory of liability. See id. at 781 ("Proximate cause is generally a question of fact for the jury . . .."). Therefore, the Court cannot grant summary judgment for Togus on the theory of negligent credentialing.

D. Negligence by Other Government Employees

Additionally, Plaintiff claims that Togus is independently negligent for the actions of its employees, namely, the nurses and pharmacists, who participated in Dr. Franco's treatment of Richard Brandt.

In its reply and at oral argument, the United States has questioned whether this is a viable theory of liability under Maine law. However, it is clear that Maine has recognized that a hospital can be liable when its employees violate the standard of care. See Shaw v. Bolduc, 658 A.2d 229, 231 (Me. 1995) (involving claims that nurses violated the standard of care). Thus, the Court concludes that Plaintiff's claims that Togus is liable for the nurses and pharmacists violating their respective standards of care are, in fact, viable.

As with Plaintiff's theory of negligent credentialing, the Court concludes that material issues of fact remain regarding whether Plaintiff can establish that negligence on the part of the nurses or the pharmacists proximately caused Plaintiff's injury. Consequently, Plaintiff's allegations of negligence by other Togus employees withstand Togus's Motion for Summary Judgment.

IV. CONCLUSION

Therefore, the Court finds that the independent contractor exception to the FTCA bars Plaintiff from arguing that Defendant Togus is vicariously liable for the negligence of Dr. Franco. Similarly, Plaintiff's allegations of negligent supervision are barred. To

the extent Plaintiff seeks to press such theories of liability, Defendant's Motion for Summary Judgment in GRANTED. However, to the extent Counts I and II of Plaintiff's Amended Complaint allege negligence on the part of Togus employees in their treatment of Richard Brandt or credentialing of Dr. Franco, the Court finds that material issues of fact remain with regard to those theories of liability. Therefore, on those two specific grounds, Togus's Motion for Summary Judgment is DENIED.

SO ORDERED.

George Z. Singal
United States District Judge

Dated on this 22nd day of December 2000.

BRANDT v. VETERANS AFFAIRS, et al Filed: 08/05/99
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Cause: 28:1346 Tort Claim

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